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IN THE

Supreme Court of the United States

October Term, 1960

No. 445

ANTHONY PETER RIELA,

Appellant,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COUNTY COURT OF TIOGA COUNTY, STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1960

No.

ANTHONY PETER RIELA,

Appellee.

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

ON APPEAL FROM THE COUNTY COURT OF TIOGA COUNTY, STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment entered by the Tioga County Court based upon the judgment of the Court of Appeals of the State of New York reversing in part, the judgment of conviction of the Appellate Division, Third Department, and remitting the case to the County Court of Tioga County for resentence, and from the denial of the motion for reargument on said appeal. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The Court of Appeals opinion is reported in 7 N. Y. 2d 751, 200 N. Y. S. 2d 43 (Appendix "A"); the Appellate Division, Third Department is reported in 9 App. Div. 2d

481, 195 N. Y. S. 2d 558 (Appendix "D"); the County Court of Tioga County opinion is reported in 14 Misc. 2d 213, 178 N. Y. S. 2d 873 (Appendix "E"); the Court of Appeals opinions denying the motion for reargument and to amend the remittitur, dated July 8, 1960 and not yet reported (Appendices "B" and "C").

Grounds on Which Jurisdiction Is Invoked

(i) This is a criminal prosecution charging the appellant, a non-resident of the State of New York, in a seventeen count indictment with the crime of criminal contempt in violation of § 600, subdivision (6) of the Penal Law, for refusing to answer questions of the Tioga County Grand Jury.

(ii) The judgment of the Court of Appeals of the State of New York appealed from in this case was entered and dated as of April 21, 1960 at the same time of the filing of its opinion (Appendix "A" herein). Said judgment affirmed the conviction but reversed in part, and remitted the case to the Tioga County Court for resentence in accordance with its opinion, the Court of Appeals holding in effect that a single contempt and not seventeen contempts, was committed.

On July 8, 1960, the Court of Appeals denied a motion for reargument and granted a motion to amend the remittitur by adding thereto the constitutional questions that were considered by that Court (Appendix "C").

On July 12, 1960 the County Court of Tioga County entered its judgment resentencing the appellant to a jail term of 60 days and fining him $250 (Appendix "F").

No further State Court appeal is permitted in the within case.

The Notice of Appeal to the Supreme Court of the United States was filed in the County Court of Tioga County, State of New York, on August 4, 1960. A copy thereof is attached as Appendix "G".

(iii) The statutory provision believed to confer jurisdiction of this appeal on the Supreme Court of the United States is Title 28 U.S.C. § 1257 (2).

(iv) It is believed that the following cases sustain the jurisdiction of this Court: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289; *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185; *United States* v. *Allegheny County*, 322 U. S. 174, 191-192; *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69, 84; *Raley* v. *Ohio*, 360 U. S. 423, 435; *Poulos* v. *New Hampshire*, 345 U. S. 395, 402; *Winters* v. *New York*, 333 U. S. 507.

(v) (A) The validity under the Constitution of the United States of the following New York State statutes is involved:

1. Penal Law § 2447 subd. 1, 2, 3(c) and 4.

2. Code of Criminal Procedure, § 618-a subd. (3).

3. McKinney's Unconsolidated Laws, § 7052 subds. (5), (6), (7) and (9).

The text of the above statutes are set forth in Appendix "H" (iii), (ii) and (iv), respectively.

(B) Other statutes involved herein are:

1. Penal Law § 600 subd. 6.

2. General Business Law § 352 subd. 5.

3. New Jersey Revised Statutes, Article 2, 2A:81-4 and 2A:81-5 (Tit. 39 N.J.S.A.).

The text of these statutes are set forth in Appendix "H" as (i), (vi) and (v), respectively.

Questions Presented

(1) Was the contempt conviction repugnant to the Fourteenth Amendment where a New York grand jury confers New York State immunity on a New Jersey resident witness, repeats the questions and the witness reasserts his plea of privilege, *but the Court fails to direct the non-resident witness to answer* the questions or to permit witness to prove the existing perils of prosecution in his home state and the Federal government as well as the inadequacy of the immunity offered?

(2) Is the joint application of Penal Law § 2447 with § 618-a of the Code of Criminal Procedure, to the facts herein, repugnant to the spirit and interpretation of the Fourteenth Amendment, and were the witness's rights and privileges thereunder violated, where a New York non-resident grand jury witness, a target of investigation and a potential defendant, is brought into New York by designating him as a material witness, and the New York immunity conferred is not co-extensive with the perils of prosecution existing for him in his home state, other states and the Federal government, and Tioga County grand jury minutes have, pursuant to Court orders, been transmitted without secrecy restrictions, to New York State agencies which are obligated by state (§§ 7051-7057, McKinney's Unconsol. Laws) to cooperate with witness's home state, other states and the Federal government, and *the Court fails to direct the witness to answer* grand jury questions despite his pleas of privilege against self-incrimination?

(3) Was appellant denied due process by Court's preclusion of proof as to the existence and reality of the perils

of prosecution, lack of authority, good faith and jurisdiction of the grand jury and inadequate immunity conferred?

(4) Appellant includes in the questions presented herein "any other denial of a federal right whether or not capable in itself of being brought here by appeal". *Flournoy* v. *Wiener*, 321 U. S. 253, 263.

Statement of the Case

Appellant, a New Jersey resident, a potential defendant and target of investigation of the Tioga County grand jury of New York, was pursuant to the application of § 618-a of the New York Code of Criminal Procedure, compelled to appear as a material witness before the Tioga grand jury. He asserted his constitutional privilege against self-incrimination before that body in refusing to answer their questions. The grand jury having knowledge of his non-residency, offered him New York State immunity (Penal Law § 2447), and again questioned him. Again he pleaded privilege. Instead of being taken before the Court for a direction to answer or permitted to establish his real and existing peril of prosecution in his home state, other states and the Federal government, the grand jury indicted him for contempt of Court (Penal Law § 600, subd. (6)).

At the trial, a jury was waived.

The defense established his non-residency, the improper application of § 618-a C.C.P. and § 2447 P.L. to the instant case, the absence of a Court direction that the witness answer grand jury questions, the transmittal of grand jury minutes to state agencies cooperating with other states and the Federal government (§§ 7051-7057, Unconsolidated Laws, McKinney's) and the obvious inadequacy of New York immunity to a non-resident witness.

The defense was precluded from proving that the existing perils of prosecution were real and substantial (*Hoffman* v. *United States*, 341 U. S. 479); that the grand jury was not acting in good faith but was created and used as the "tool" of the Acting Commissioner of Investigation; that it lacked jurisdiction and authority to pursue the inquiry; that it was investigating a meeting and a party and not a crime (R. 182); and that the New York immunity was dissipated when the grand jury minutes were made available to agencies cooperating with other states and the Federal government, the judge having failed to impose restrictions on their secrecy.

The federal questions sought to be reviewed are and were raised, as follows:

(i) The denial of procedural due process by the improper application and use of § 618-a of the Code of Criminal Procedure to obtain the presence in New York State of the nonresident appellant by alleging he was a material witness before a New York grand jury when in fact he was a potential defendant and target of investigation.

This issue was raised before the trial court by motion on February 13, 1958 and denied (R. 31); on the motion to acquit (R. 269, 289), denied (R. 269, 422); by statements to the Court (R. 31, 50-56), and by the District Attorney's statement to the appellant (R. 71).

The trial court's opinion stated that this issue is collateral and not relevant and that the witness appeared voluntarily (R. 445).

The point was further pursued before the Appellate Division, Third Department in Point II (pp. 17-23) of Appellant's Brief and rejected in that Court's opinion (R. 457-459).

In the Court of Appeals, the point was urged in Point VI (pp. 36-42). The Court of Appeals considered this argument in conjunction with other constitutional issues as appears from the amendment of its Remittitur on July 8, 1960 (Appendix, "C").

(ii) The joint application of § 618-a, Code of Criminal Procedure with § 2447 Penal Law to a New York non-resident violates procedural due process under the Fourteenth Amendment where the witness is a potential defendant and a target of investigation, and the New York State immunity is not co-extensive with the perils of prosecution in the witness's home state, other states, and the Federal government, where New York grand jury minutes are forwarded to a State Commission of Investigation obligated by statute (Unconsol. Laws §7052, subd. (5) (6)) to investigate violations of federal law in New York and to cooperate with other states and the Federal government.

This point was urged before the trial court in a motion for dismissal of the indictment (R. 201, 210-214, 218-219, 262, 304-306, 344-345), and in a motion for arrest of judgment (R. 383-385, 402, 405-406). The motions were denied (R. 269, 422), and the argument overruled in its opinion (R. 437-439).

The point was further pursued before the Appellate Division, Third Department in Point II (pp. 17-23) of Appellant's Brief before that Court and rejected in its opinion (R. 461).

The Court of Appeals refrained from commenting on this issue in its opinion. However, the remittitur as amended (Appendix "C") concedes that the issue was presented to, passed upon, and rejected by that Court.

(iii) The failure of the Court to order or direct the non-resident grand jury witness to answer questions to which

the plea of privilege is asserted, after the offer of New York immunity and the witness' reassertion of his plea, where the existing peril of prosecution is real and substantial, and the grand jury minutes transmitted to a New York agency cooperating with other states and the Federal government, constitutes a denial of procedural due process in violation of the Fourteenth Amendment.

This point was urged before the trial court (R. 191-193, 196, 197) upon cross-examination of the grand jury foreman, by motion for a directed judgment of acquittal, denied (R. 199), and by motion for dismissal of the indictment and for acquittal (R. 203-204). These motions were denied (R. 206); by offer of proof to show existing perils of prosecution, argument (R. 222, 232, 237-238), denied by the Court (R. 249, 252, 259-262); by motion to acquit and the denial thereof (R. 268-269); by motion for judgment of acquittal and summation (R. 275-277; 282-283, 285-286, 288, 294, 304-306, 313-316, 349, 354), denied by the Court's decision (R. 373); by motions for arrest of judgment and for a new trial (R. 380-417) which were denied (R. 422).

The trial court's opinion dismissed this argument (R. 443).

The point was further pursued before the Appellate Division, Third Department, in Appellant's Brief (Point I, pp. 13-16) and overruled (R. 460-461).

The point was submitted to the Court of Appeals in Appellant's Brief (Point I, pp. 13-21) but evaded by that Court, 7 N. Y. 2d 571, 575-576, 200 N. Y. S. 2d 43, 45, which held "that the grand jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt".

(iv) The offer of New York State immunity to a nonresident is not co-extensive with the existing perils of

prosecution where the witness must return to his home state and where New York grand jury minutes are transmitted to divers agencies cooperating with his home state, other states, and the Federal government. The trial court's rejection of the appellant's offer of proof to establish the existing perils of prosecution and the absence of a court hearing on his asserted plea of privilege before the Grand Jury after conferral of New York immunity, constituted a denial of due process.

This issue was presented to the trial court by offer of proof (R. 208, 232, 248, 249), denied (R. 249); by motion for acquittal and summation (R. 304-305, 384, 402-406), denied (R. 422). The Court's opinion dismissed the contention (R. 437-439).

The issue was presented to the Appellate Division, Third Department, by Appellant's Brief (Point II, pp. 17-23) and rejected by its opinion (R. 461).

The issue was presented to the Court of Appeals in Appellant's Brief (Point II, pp. 21-24) and Point VI (pp. 36-38). The Court overruled appellant in its opinion, 7 N. Y. 2d 571, 576, 200 N. Y. S. 2d 43, 45 stating: "And to the second point, it is equally clear, under current decisions, that a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the federal government or by other states."

(v) The trial court's denial of the appellant's offer of proof to show the lack of authority, jurisdiction and good faith of the Grand Jury, constituted a denial of due process.

This issue was presented to the trial court by appellant by cross-examination of the grand jury foreman, excluded by the Court (R. 178-179, 182, 164, 146, 172-176); by offer

of proof (R. 255-259); denied (R. 262); by motion to acquit (R. 268-275), denied (R. 269); by reading the court orders into the record (R. 213-216); by motion for arrest of judgment (R. 389, 400, 410, 412), denied (R. 422).

The trial court's opinion upheld the authority, jurisdiction and good faith of the grand jury by adopting the theory of presumption of regularity (R. 435) over the presumption of innocence (R. 205).

The point was pursued before the Appellate Division, Third Department in appellant's brief (Point VI, pp. 31-36). That Court ignored the issue by holding that a grand jury may investigate whether a crime has been committed or not (R. 462).

The point was further presented to the Court of Appeals in Appellant's Brief (Point V, pp. 31-36) and held not to warrant discussion, 7 N. Y. 2d 571, 575, 200 N. Y. S. 2d 43, 45.

The Questions Are Substantial

(1) The lack of a court direction that witness answer.

The lack of a Court direction that a witness answer where a plea of privilege against self-incrimination is asserted, constitutes a denial of due process and a violation of uniformly recognized procedure in both state and federal courts. *Quinn* v. *United States*, 349 U. S. 155, 167.

A conflict pertaining to the validity of procedure in contempt adjudication exists between the New York Court of Appeals in *People* v. *Riela*, 7 N. Y. 2d 571, 200 N. Y. S. 2d 43, and this Court in *Brown* v. *United States*, 359 U. S. 41, 49, *Levine* v. *United States*, 362 U. S. 610, 612, *Raley* v. *Ohio*, 360 U. S. 423 (state court-direction by court), *Mills* v. *Louisiana*, 360 U. S. 230 (state court-direction by court),

Knapp v. *Schweitzer*, 357 U. S. 371 (state court-direction by judge in § 750 Judiciary Law proceeding), *Emspak* v. *United States*, 349 U. S. 190, 197, 202 (Congressional Committee-direction required), the First Circuit Court in *Carlson* v. *United States*, 209 F. 2d 209, 214 (C.A. 1st Cir.) (court-direction required—United States District Court Grand Jury), and the Supreme Judicial Court of Maine in *Gendron* v. *Burnham*, 146 Me. 387, 405-406, 82 A. 2d 773, 784-788 (state court-direction required).

The Court of Appeals cited *Mills* and *Knapp*, *supra*, and *Commission of Investigation* v. *Lombardozzi*, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed sub nom. *Castellano* v. *Commission of Investigation*, 361 U. S. 7. *Mills* and *Knapp* each had a court direction after the grant of immunity. *Castellano* had the direction by the Commission after the immunity grant.

The Appellate Division, Third Department, in its opinion (R. 461) states:

> "The case of *Brown* v. *United States* (369 U. S. 41) uses language from which appellant gains some comfort, but it involved a Federal statute and is by no means controlling in New York State in a prosecution under section 600 of the Penal Law and where the procedure authorized by section 2447 of the Penal Law was meticulously followed."

The New York Court of Appeals (7 N. Y. 2d 571, 200 N. Y. S. 2d 43, 45) adopts this reasoning by stating: "it is necessary only to observe that a reading of section 2447 makes it manifest that the grand jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt." This begs the question for it omits the entire issue of procedural due process.

However, Penal Law § 2447 is no more effective in granting State immunity as applied to the instant case than the immunity conferred federally in *Brown* v. *United States*, 349 U. S. 41, by § 205 of the Motor Carrier Act (49 U.S.C. § 305 (d)); or the Ohio immunity statute in *Raley* v. *Ohio*, 360 U. S. 423; or, the Louisiana statute conferring immunity in *Mills* v. *Louisiana*, 360 U. S. 230. Each of these cases held that even though immunity be conferred by statute, the *specific direction* to answer is a vital condition precedent to the commission of contempt.

Penal Law § 2447 sets forth the condition precedent for the grand jury conferring immunity but it does not and cannot substitute the right of a witness to be heard by the court to interpose his plea of privilege against self-incrimination and to establish the validity thereof. This statute cannot usurp the power and duty of a trial judge to evaluate the merits of the plea of privilege, especially where a non-resident is involved under the peculiar facts herein. If it does, it denies the substantive due process as well as procedural due process of a witness. It was so applied here.

The New York Court ignored *Brown* v. *United States*, 359 U. S. 41, 49, cited and argued by appellant. The procedure there set forth by Mr. Justice Stewart at 351 U. S. 41, 49 is clear and unambiguous.

> "Even after an adverse ruling upon the claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer. • • • The court did so.
>
> "When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt, • • • "

Due process requires the Court to give the witness an opportunity to be heard. *Carlson* v. *United States*, 209 F. 2d 209, 215 (C. A. 1st Cir.).

(2) The denial of procedural and substantive due process by joint application of statutes.

The joint application of § 618-a C.C.P. with § 2447 Penal Law to the facts herein, involving a New York non-resident, violates due process under the Fourteenth Amendment where the non-resident witness is a potential defendant and target of investigation. The granting of local state immunity is not co-extensive with the existing perils of prosecution and dissipates the witness's plea of privilege in his home state, other states and the Federal government. The joint statutory application to the facts herein circumvented the constitutional safeguards of the witness.

The federal questions involved herein are real and substantial. The certificate of the Court of Appeals amending the remittitur shows that it considered the constitutional questions and that such consideration was necessary to the Court's determination.

Although Penal Law § 2447 has been upheld as constitutional, this is the first case in which it has been applied to a non-resident who must return to his home state. In the instant case, the transmittal of grand jury minutes to a state agency obligated by law to cooperate with other states and the Federal government (§§ 7051-7057, Unconsol. Laws), vitiates and nullifies the state and Federal constitutional privilege against self-incrimination and is repugnant to the Fourteenth Amendment. Although validly applied in other cases, the application of Penal Law § 2447 to the facts herein rendered the statute invalid.

§ 618-a C.C.P. is applicable solely to material witnesses and not as here to a potential defendant and target of in-

vestigation. That appellant was a potential defendant is apparent from the District Attorney's statement to him before the grand jury (R. 71). cf. *State of New York* v. *O'Neill*, 359 U. S. 1, 8, where the constitutionality of this statute was upheld provided a hearing is held. However, Mr. Justice Frankfurter at page 8, declared:

> "No claim is before us that the administration of the statute in the particular circumstances of this case violates due process."

In the instant case, repeated claim was made that no hearing on materiality was held (although the order of the forwarding state so declares), despite the reservation of his claim and rights to a hearing on the issue of his materiality as a witness, that no crime was committed; that the grand jury had no authority and jurisdiction to investigate a party; and that the grand jury was created as a "tool" or implement of the Office of the Commissioner of Investigation.

Assuming, but not conceding, the proper application of § 618-a C.C.P. herein, the further use of § 2447 Penal Law to the non-resident herein cries injustice where no direction to answer was made to the witness and *no opportunity given to the witness* to be heard as to why his plea of privilege was asserted, or to prove the existing perils of prosecution. The instant grand jury minutes were transmitted pursuant to orders signed by the same trial judge, to the Acting Commissioner of Investigation on January 15, 1958, and subsequently on August 1, 1958 to the Commission of Investigation, and thereafter, on August 4, 1959 to the United States Attorney for the Southern District of New York, for use at trial of Indictment #C-159-35 in which appellant was a defendant. These facts were reason enough to establish peril of prosecution. Further the trial judge

had judicial notice (and actual notice) of the statute (Unconsol. Laws § 7052 subd. (5) (6) (7) and (9)) of the obligation of the Commission to cooperate with other state and federal agencies.

It is the joint application of these statutes to the facts herein which constitutes a denial of substantive and procedure due process.

In the light of common investigatory practices of state and county grand juries with extra-territorial powers of subpoena upheld by this Court (*New York* v. *O'Neill*, 359 U. S. 1), a non-resident witness's constitutional rights of privilege against self-incrimination in his home state, other states and the Federal government, should be clarified and ordained.

It was obvious to the trial court that the New York immunity to a non-resident, in exchange for testimonial compulsion, was not co-extensive with the existing perils of prosecution in his home state, other states and the Federal government where the witness *had* to return home and the grand jury minutes forwarded to divers agencies cooperating with his home state. cf. *Hoffman* v. *United States*, 341 U. S. 479; cf. *Ullman* v. *United States*, 350 U. S. 422; cf. *Knapp* v. *Schweitzer*, 357 U. S. 371.

No case other than the within involving a non-resident witness of New York to whom New York immunity is granted, has ever been decided, where existing facts make the offered immunity hollow and not co-extensive with the real perils of prosecution.[1]

---

[1] The appellant herein was indicted on May 13, 1959 by the United States District Court (S.D.N.Y.) for the crime of conspiracy to obstruct justice, based on the incident investigated by the Tioga Grand Jury. He was convicted on January 13, 1960. Appeal is now pending before the Court of Appeals, Second Circuit.

(3) *Feldman* v. *United States* should be reconsidered.

The facts herein warrant the reconsideration of the doctrine of *Feldman* v. *United States*, 322 U. S. 487, 489, 493, because of the transmittal[2] of the grand jury testimony to the New York State Commission of Investigation which agency is obligated by statute to cooperate with the witness' home state, other states and the Federal government (§ 7052 subd. (5) (6), (Unconsol. Laws).

The current vogue of state investigative committees and investigating grand juries who cooperate with each other and with other states and Federal agencies is nationwide. The state investigative committees, as such, have no extra-state powers of subpoena. Grand juries do. It will become standard common practice to have the result as it exists in the within case, where state committees, by statute, are obligated as here (§ 7052 subd. (5) (6) (7) and (9) Unconsol. Laws), to cooperate with other states and the Federal government. Where this occurs, immunity to non-residents or residents is hollow and definitely not co-extensive with the existing perils of prosecution (*Hoffman* v. *United States*, 341 U. S. 479).

For testimony so extracted to be used in federal and state prosecutions—under threat of contempt for failure to give such testimony—does violence to the rights of the privilege against self-incrimination.

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[2] The Tioga County Court issued court orders transmitting copies of the grand jury minutes as follows:

(a) On January 15, 1958, to the Acting Commissioner of Investigation of the State of New York;

(b) On August 1, 1958, to the Commission of Investigation, the successor agency;

(c) On August 4, 1959, to the United States Attorney, Southern District of New York, for use at trial of Indictment No. C-159-35, in which appellant was a defendant, was convicted and is now on appeal.

The proper procedure in obtaining such testimony would be for the Court to impose secrecy restrictions or to otherwise protect the witness who is on the horns of a dilemma. See *Matter of Herlands (Carcietta)*, 204 Misc. 373, 377, 124 N. Y. S. 2d 402, 405-406; *In Re Amato*, 204 Misc. 454, 459, 124 N. Y. S. 2d 726, 730. Failure by the trial court to so act makes it an accomplice in a known and existing method, to deprive a witness of his privilege against self-incrimination.

(4) The doctrine of *Jack* v. *Kansas* and *Brown* v. *Walker* is inapplicable.

Each of the lower courts have relied upon the doctrine that the immunity granted by a state is sufficient and need not be applicable to the Federal government, and vice versa. *Jack* v. *Kansas*, 199 U. S. 372, *Brown* v. *Walker*, 161 U. S. 591.

This principle was based on the absence of the real danger of multiple prosecutions.

The New York rule is based on *Dunham* v. *Ottinger*, 243 N. Y. 423, 438-439. But, *Dunham* in reaching its conclusion (pp. 438, 439), relied upon the secrecy provisions contained in the statute which that case upheld and the misdemeanor punishment for publicizing information obtained pursuant to the statute there involved (§ 352 subd. (5), Gen. Bus. Law), (Vol. 19, McKinney's Consol. Laws) *Dunham* relied on *Brown* v. *Walker*.

In the instant case, the peril of prosecution was real, and not remote. *Hoffman* v. *United States*, 341 U. S. 479. The secrecy provision of the *Dunham* statute was non-existent. To the contrary, publicity and cooperation were compulsory. The grand jury minutes were transmitted to state agencies obligated by law to cooperate with other state

and the Federal government (§§ 7052, subds. (5), (6), (7), (9) Unconsol. Laws).

The New York Court of Appeals relied on *Knapp* v. *Schweitzer*, 357 U. S. 371 which in turn relies on *Jack* v. *Kansas*, 199 U. S. 372.

None of the foregoing cases, dealt with a non-resident witness' plea of privilege against self incrimination where the peril of prosecution is a reality and where grand jury minutes are freely supplied to federal and state agencies.

The facts herein require the application of *Hoffman* v. *United States*, 341 U. S. 479 instead of *Jack* v. *Kansas*, 199 U. S. 372 because the perils of prosecution were a reality, not a contingency, and the proffered immunity not co-extensive therewith.

Opinions Below

Set forth in the Appendix as exhibits are the following opinions of the state courts:

"A." Court of Appeals opinion, *People* v. *Riela*, 7 N. Y. 2d 571, 200 N. Y. S. 2d 43.

"B." Court of Appeals order denying motion for reargument, July 8, 1960.

"C." Court of Appeals order amending remittitur by inserting constitutional question, July 8, 1960.

"D." Appellate Division, Third Department, opinion, *People* v. *Riela*, 9 A. D. 2d 481, 195 N. Y. S. 2d 558.

"E." Opinion, County Court, Tioga County, *People* v. *Riela*, 14 Misc. 2d 213, 178 N. Y. S. 2d 873.

The judgment of conviction appealed from was entered in the County Court of Tioga County, New York, on July 12, 1960, appended hereto as Appendix "F".

CONCLUSION

WHEREFORE, appellant prays that this Court note probable jurisdiction in instant case and grant plenary consideration, with briefs on the merits and oral argument; and in the alternative that consideration of the question of jurisdiction be postponed until such a consideration on the merits. Appellant further prays that, if he be mistaken in his belief that this Court has jurisdiction of this appeal, under 28 U.S.C. § 1257 (2), then, and in that event, the appeal papers be treated as a Petition for Certiorari under 28 U.S.C. § 2103, and the petition be granted. See *Sweezy* v. *New Hampshire*, 354 U. S. 234 and *Raley* v. *Ohio*, 360 U. S. 423.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Court of Appeals
(7 N. Y. 2d 571, 200 N. Y. S. 2d 43)

PEOPLE v. RIELA
Cite as 200 N. Y. S. 2d 43

7 N. Y. 2d 571

PEOPLE of the State of New York, Respondent, v.
Anthony Peter RIELA, Appellant.

Court of Appeals of New York.
April 21, 1960.

* * * * * *

FULD, Judge.

Anthony Peter Riela was one of the 60 odd guests who had gathered at the country estate of Joseph Barbara in Apalachin, New York, on a November day in 1957. This gathering, having attracted considerable attention from law enforcement officials, became the target of investigation by the Grand Jury of Tioga County. Riela, called as a witness, made two appearances before that body. From the beginning, he refused to answer any questions concerning the "Apalachin meeting", as it has come to be known, on the ground that to do so might tend to incriminate him and, in the course of his two appearances before the Grand Jury, he persisted in the claim of privilege and declined to answer 17 questions about that same subject. Thereupon, at the request of the District Attorney of Tioga County, the Grand Jury, acting pursuant to the authority vested in it by section 2447 of the Penal Law, Consol. Laws, c. 40,

"conferred immunity" upon Riela and ordered him, following the procedure prescribed by the statute, to answer the questions previously put to him. The same 17 questions were again asked and Riela, reiterating his reliance upon the privilege, again refused to answer.

As a consequence of his refusal, the Grand Jury indicted him, charging him, in 17 different counts, with 17 separate crimes of contempt in violation of section 600 of the Penal Law. The defendant waived his right to a jury and went to trial before the County Judge. The latter, finding him guilty on all 17 counts, sentenced him to 60 days in jail upon each, to run concurrently, and imposed a fine of $250 on each count, for a total fine of $4,250.

[1, 2] Before proceeding to an elaboration of the question which prompted the grant of leave to appeal to this court, we consider briefly the only two other points urged by the defendant which warrant discussion: (1) that the immunity provided by section 2447 of the Penal Law had not been properly conferred and (2) that, in any event, such immunity was not broad enough to assure him the protection guaranteed by the Constitution. As to the first, it is necessary only to observe that a reading of section 2447 makes it manifest that the Grand Jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt. And, as to the second point, it is equally clear, under current decisions, that a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the federal government or by other states. See, e.g., Mills v. Louisiana, 360 U. S. 230, 79 S. Ct. 980, 3 L. Ed. 2d 1193; Knapp v. Schweitzer, 357

U. S. 371, 78 S. Ct. 1302, 2 L. Ed. 2d 1393; Commission of Investigation of State of N. Y. v. Lombardozzi, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed sub nom. Castellano v. Commission of Investigation, 361 U. S. 7, 80 S. Ct. 51, 4 L. Ed. 2d 49.

[3] We come, now, to the real question in the case, namely, whether the defendant is guilty of 17 crimes of contempt or of one. Concerning this, it is our opinion that, while there can be no doubt that Riela's conduct before the Grand Jury constituted criminal contempt under section 600 of the Penal Law, his conviction of 17 separate crimes of contempt, each susceptible to punishment of a year in prison, was totally unjustified.

It is quite true, as the Appellate Division observed [9 A. D. 2d 481, 195 N. Y. S. 2d 563], that "the questions [asked of the defendant] were by no means the same question rephrased"; but, in a case such as the present, where the refusal to answer was grounded, albeit mistakenly on the privilege against self-incrimination, the circumstance that no two questions could have been answered by a single response is beside the point. What is of significance is that it was apparent from the very start of his interrogation that Riela, relying upon the privilege, would decline to answer any question bearing on the "Apalachin meeting", and that the questions, different though they were from one another, all related to that one subject. This being so, he is guilty of the single contempt of refusing to give testimony concerning the Apalachin gathering, rather than 17 contempts for refusal to answer individual questions about it. See, e.g., Yates v. United States, 355 U. S. 66, 73, 78 S. Ct. 128, 2 L. Ed. 2d 95; United States v. Costello, 2 Cir., 198 F. 2d 200, 204, certiorari denied 344 U. S. 874, 73 S. Ct.

166, 97 L. Ed. 677; United States v. Orman, 3 Cir., 207 F. 2d 148, 160; Maxwell v. Rives, 11 Nev. 213, 221; Fawick Airflex Co. v. United Elec., Radio & Mach. Workers, Ohio App., 92 N. E. 2d 431, 436, appeal dismissed 154 Ohio St. 206, 93 N. E. 2d 480.

[4] Any other result impresses us as offensive, for, if each separate reassertion of privilege and refusal to answer were to be treated as a distinct contempt, there would be no limit to the number of contempts for which Riela could have been held. The District Attorney could just as well have asked 60 questions about Apalachin—for instance, whether Riela knew each of the 60 individuals reputed to have been present—as 17, and, if each could become the predicate of a distinct contempt, the limit of punishment would then depend only on the extent of the District Attorney's ingenuity and whim. As the Supreme Court said in the somewhat similar case of Yates v. United States (355 U. S. 66, 73, 78 S. Ct. 128, 133, supra), "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."

[5, 6] Riela, under existing law, may well have been under the necessity, once he asserted the privilege, of repeating the claim as to each and every question asked him, lest an answer to any one be deemed to effect a complete waiver of the privilege. See e.g., People v. Cassidy, 213 N. Y. 388, 394, 107 N. E. 713, 715; Rogers v. United States, 340 U. S. 367, 372-374, 71 S. Ct. 438, 95 L. Ed. 344; Brown v. Walker, 161 U. S. 591, 597, 16 S. Ct. 644, 40 L. Ed. 819; 8 Wigmore, Evidence [3d ed., 1940], pp. 438-439. This being so—to paraphrase what was said in the Costello case (198 F. 2d 200, 204, supra)—the contempt was total when the defendant

made it clear that he would not answer questions about Apalachin on the ground of self-incrimination and his repeated refusals may not properly be considered as anything more than expressions of his intention to adhere to his initial assertion of the privilege; and, surely, they were not separately punishable. The contempt here to be punished is Riela's misguided refusal to give any testimony about Apalachin, and not his reiteration of that refusal in response to the many questions which the District Attorney elected to put to him,

People v. Saperstein (2 N. Y. 2d 210, 159 N. Y. S. 2d 160, 162, certiorari denied 335 U. S. 946, 77 S. Ct. 825, 1 L. Ed. 2d 856), upon which the People strongly rely, does not support their contrary position; the situation with which we there dealt was essentially different from the one now before us. Saperstein was adjudged guilty of five crimes of contempt because of his evasiveness or, more specifically, his refusal "to state definitely" who were the participants in five separate telephone conversations which had been wire tapped. Each of the contempts was based not upon a refusal grounded on any claim of privilege, but, among other things, on his patently evasive testimony that he did not know, and could not tell, whether he himself had participated in those telephone conversations. These refusals came at different points during the course of testimony which was otherwise freely given, and each refusal was unrelated to every other one. Under such circumstances, there could be no assurance, after the witness had refused to answer the question with respect to the first phone call, that he would likewise refuse to answer the later questions about the other conversations. It was not possible in Saperstein, as it was here, to predict or

foresee the pattern of refusal which necessarily attends the assertion of a claim of privilege.

In short, what distinguishes this case from People v. Saperstein is that here we have a claim of privilege which "carved out an area of refusal". Yates v. United States, 355 U. S. 66, 73, 78 S. Ct. 128, 133, supra. In the present case, the District Attorney necessarily knew, ahead of time, that the claim of privilege once asserted would be repeated, while in Saperstein the prosecutor had to continue questioning to find the limits of the defendant's refusal to answer. In Saperstein, in other words, the District Attorney was engaged in bona fide interrogation, in the sense that he could reasonably have supposed that the witness would answer each of the questions asked, while here the District Attorney repeated 17 questions knowing full well from Riela's response to his first query that he would not answer any of them.

The defendant committed but a single contempt with relation to one subject; his conviction of 17 separate crimes was, therefore, impermissible and the sentences imposed may not stand.

The judgment should be reversed and the case remitted to the County Court of Tioga County for resentence.

DESMOND C. J., and DYE, FROESSEL, VAN VOORHEES, BURKE and FOSTER, JJ., concur.

Judgment reversed, etc.

APPENDIX "B"

Order of the Court of Appeals Denying Motion for Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 414

The People &c.,

Respondent,

vs.

Anthony P. Riela,

Appellant.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

(SEAL)

GEARON KIMBALL
Deputy Clerk

APPENDIX "C"

Order of the Court of Appeals Amending Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 414

The People &c.,

Respondent,

vs.

Anthony P. Riela,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Appendix "C"—Order of the Court of Appeals Amending Remittitur

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States as follows: The defendant contended that the application in his case of §2447 of the Penal Law and §618-a of the Code of Criminal Procedure violated his rights under the Fourteenth Amendment of the Federal Constitution. The Court of Appeals held that the defendant's rights under the Fourteenth Amendment were not violated. (See *People* v. *Riela*, 7 N. Y. 2d 571.)

And the County Court of Tioga County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(Seal)

Gearon Kimball
Deputy Clerk

APPENDIX "D"

Opinion of the Appellate Division, Third Department

(9 A. D. 2d 481, 195 N. Y. S. 2d 558)

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

ANTHONY PETER RIELA,

Defendant-Appellant.

[1406]

Argued September Term, 1959

Decided November , 1959.

Before:

HON. FRANCIS BERGAN,
Justice Presiding,

HON. WILLIAM H. COON,
HON. JAMES GIBSON,
HON. J. CLARENCE HERLIHY,
HON. WALTER B. REYNOLDS,
Associate Justices.

Appeal from a judgment of conviction rendered by the County Court of Tioga County (Clohessy, J.), of the crime

of criminal contempt for violation of section 600, subdivision 6, of the Penal Law.

LOUIS MANSDORF, Attorney for Defendant-Appellant, 320 Broadway, New York 7, New York.

GEORGE BOLDMAN, District Attorney of Tioga County, Attorney for Respondent, 27-29 Lake Street, Owego, New York.

OPINION FOR AFFIRMANCE

COON, *J.*:

The defendant Riela was one of sixty-two or more men who gathered at the home of Joseph Barbara, Sr., at Apalachin, Tioga County, N. Y., on November 14, 1957, at what is now commonly known as the "Apalachin meeting". Thereafter a duly impanneled Grand Jury of Tioga County initiated an investigation to determine whether or not any crime or crimes had been committed or planned at the meeting, and particularly whether the crimes of conspiracy, bribery of public officials or violation of section 340 of the General Business Law, had been committed in Tioga County. Since Riela lived in New Jersey a certificate was issued, pursuant to section 618-a of the Code of Criminal Procedure, stating that Riela was a "material and necessary" witness in the investigation; a hearing was held thereon in the Superior Court of New Jersey, Essex County, and a subpoena-order issued directing Riela's appearance before the Tioga County Grand Jury.

Upon his appearance before that Grand Jury seventeen questions relevant to the inquiry were propounded to him, and he asserted his privilege of self incrimination under the Fifth Amendment to each of the questions propounded.

Appendix "D"—Opinion of the Appellate Division, Third Department

Thereupon, at the request of the District Attorney of Tioga County, the Grand Jury voted to confer and did confer immunity, pursuant to section 2447 of the Penal Law. Riela was fully informed of the meaning and scope of the immunity granted and warned that failure to answer thereafter might result in a charge of contempt. He was given the privilege from time to time of consulting with his counsel. Each of the seventeen questions was again asked, and in each instance the privilege against self incrimination was asserted and an answer refused. The foreman of the Grand Jury thereupon specifically ordered Riela to answer each question, one by one, and in each instance he refused. The Grand Jury thereupon indicted him for criminal contempt under section 600, subdivision 6, of the Penal Law. The indictment contained seventeen counts, each representing the refusal to answer one of the seventeen questions which Riela refused to answer. A jury trial was waived; and the trial court found Riela guilty upon all seventeen counts and he was sentenced to sixty days in jail upon each count, the sentences to run concurrently, and a fine of $250 was imposed upon each count.

Among other things appellant contends that he was given no opportunity to establish whether or not he was a material witness who could be properly summoned under the provisions of section 618 of the Code of Criminal Procedure. The summoning court certified that Riela's testimony was material, together with a recital of the facts upon which the materiality was based, and thus the materiality was at least prima facie established. The New Jersey court was not bound to order the appearance of Riela if it could be shown that his appearance was not material to the investigation, and when he was brought before the New Jersey court was the time to try out that

question. Moreover, the trial for contempt itself provided a full hearing upon that question, and the requirements of due process have been met.

Appellant argues that only the presiding Judge could order the defendant to answer, and that the violation of an order by the Grand Jury, or the foreman of the Grand Jury, to answer, does not constitute criminal contempt. The grand jury is an arm of the court, and once it has a witness before it is expressly authorized by statute to grant immunity and to make an order that the witness answer. The first sentence of section 2447, subdivision 1, of the Penal Law, reads: "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made *by such competent authority* that such person answer the question or produce the evidence, such person shall comply with the order." (Emphasis supplied.) Subdivision 3 of section 2447 defines "competent authority" to include: "(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence;".

The only purpose of taking a witness who asserts self incrimination before the judge is for a determination of the question of whether the claim of privilege is justified or not. [Where the grand jury is expressly authorized to confer immunity and immunity as broad as the privilege is conferred, the immunity replaces the asserted privilege and there is no necessity for an appearance before the judge.] Witnesses (participants in the same Apalachin

meeting) have been properly held in contempt for refusal to answer upon the order of the Commission of Investigation of the State of New York under section 2447 of the Penal Law without any court direction to answer. (*Matter of Comm. of Investigation of State of N. Y.* v. *Lombardozzi*, 7 A. D. 2d 48, affd. 5 N. Y. 2d 1026, cert. denied — U. S. — [Oct. 1959]). Appellant cites *People* v. *Breslin* (306 N. Y. 294); *Matter of Knapp* v. *Schweitzer* (2 N. Y. 2d 913), and *Matter of Spector* v. *Allen* (281 N. Y. 251). In the *Breslin* case, while the court observed in passing that the witness had been directed to answer by the court, that question was not an issue in the case, and section 2447 of the Penal Law was not in that case at all. In the *Knapp* case, while the court issued the direction, whether such was a necessity or not was not an issue. In the *Spector* case it was simply held that a grand jury foreman had no authority to issue a "mandate" within the meaning of section 750 of the Judiciary Law. This decision would seem to have no application to a violation of section 600 of the Penal Law, and especially in view of section 2447 of that law. The case of *Brown* v. *United States* (369 U. S. 41) uses language from which appellant gains some comfort, but it involved a Federal statute and is by no means controlling in New York State in a prosecution under section 600 of the Penal Law and where the procedure authorized by section 2447 of the Penal Law was meticulously followed.

Appellant further argues that the immunity granted under section 2447 was not adequate protection in all jurisdictions, including Federal courts, and especially in view of the co-operation between Tioga County authorities and other governmental agencies. The fact remains that the immunity granted was as broad as the State of New York may grant and protects the defendant from any prosecu-

tion by any agency of the State of New York, and was coextensive with his privilege against self incrimination in New York, and it is well settled that the privilege against self incrimination does not give a witness the right, under such circumstances, to withhold information from New York authorities on the ground that such information might incriminate him elsewhere. (*Matter of Comm. of Investigation of State of N. Y.* v. *Lombardozzi*, 7 A. D. 2d 48, affd. 5 N. Y. 2d 1026, cert. denied — U. S. — [Oct. 1959]; *Matter of Knapp* v. *Schweitzer*, 2 N. Y. 2d 913, affd. 357 U. S. 371; *Dunham* v. *Ottinger*, 243 N. Y. 423.)

Appellant further asserts that the Grand Jury was without power to act because there was no specific crime charged or established at the Apalachin meeting. While section 254 of the Code of Criminal Procedure empowers a grand jury "to inquire into all crimes committed or triable in the county * * *" it is well established by the weight of authority that a grand jury has broad powers of investigation, including the power to investigate whether a crime within its jurisdiction has been committed or not. (*Blair* v. *United States*, 250 U. S. 273; *Hendricks* v. *United States*, 223 U. S. 178; *Hale* v. *Henkel*, 201 U. S. 43; *People* v. *Stern*, 3 N. Y. 2d 658.)

Appellant further urges that, if a criminal contempt were committed at all, but one contempt, not seventeen, was committed. A difficult problem is always presented when multiple questions are asked of the same witness, in determining whether a single contempt or multiple contempts result from refusal to answer. The answer to the problem must depend upon the particular facts and circumstances of each case. It is unnecessary to set forth the seventeen questions in full here. Suffice to say that fifteen of them related in some manner to the Apalachin meeting

and two of them related to offers of bribes; the questions were by no means the same question rephrased; no two of them could have been answered by a single answer, and they were obviously directed at different and independent avenues of inquiry. In considering the possibility of conspiracy, for instance, it became pertinent for the Grand Jury to know, not only the witness' present acquaintance with Barbara, but his previous meetings and acquaintance and association with others who attended the meeting and the circumstances leading to his own attendance. Of course the questions must relate in some way to the general subject of investigation in order to be relevant at all. But each question sought to establish a separate and independent relevant facts which would not be established by an answer to any other question. Under the broad power of inquiry and investigation vested in a grand jury the questions were pertinent, were separate and independent of each other, and the refusal to answer each was a separate contempt. (*People* v. *Saperstein*, 2 N. Y. 2d 210.) The case of *Yates* v. *United States* (355 U. S. 66) dealt with contempt under a Federal statute and is not binding upon the courts of New York State in a case involving the New York State Penal Law. Moreover, in the *Yates* case the witness made it expressly clear that she would refuse to answer any questions within a particular avenue of inquiry, while in the instant case the witness simply refused to answer each question as it was asked.

We find no error in the admission or rejection of evidence at the trial. Appellant has had a full and fair trial and the evidence is ample to establish beyond a reasonable doubt his willful, contumacious and unlawful refusal to answer legal and proper questions.

The judgment should be affirmed.

APPENDIX "E"

Opinion of County Court, Tioga County, New York
(14 Misc. 2d 213, 178 N. Y. S. 2d 873)

STATE OF NEW YORK
COUNTY COURT

COUNTY OF TIOGA

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ANTHONY PETER RIELA,

Defendant.

GEORGE BOLDMAN, District Attorney, and
CARL VERGARI, for People.

LOUIS MANSDORF, for defendant.

This case was tried without a jury. The defendant is charged with criminal contempt in violation of Section 600, subdivision 6, of the Penal Law under an indictment containing seventeen counts.

The Grand Jury was engaged in an investigation to determine whether the crimes of conspiracy, bribery of public officials and violation of Section 340 of the General Business Law had been committed in Tioga County.

In the course of such investigation the Grand Jury was making inquiry into a meeting of sixty-two or more persons near Apalachin, in the County of Tioga, on November 14,

1957. This gathering has been generally designated as the Apalachin meeting.

Defendant is a resident of the State of New Jersey. He was believed to have been in attendance at such meeting and was summoned to appear before the Grand Jury. After being sworn as a witness, he was asked seventeen questions which he refused to answer, asserting his privilege against self-incrimination.

The Grand Jury then voted for and granted to the witness immunity under Section 2447 of the Penal Law. The seventeen questions were again asked him and he again refused to answer under claim of privilege. As a result the Grand Jury found and reported the indictment. Each count covers one question.

In an investigation of the kind involved in this case there apply certain basic and fundamental principles and rules to which reference may be advisable at this point.

With every right and privilege there are a corresponding duty and obligation. The right and privilege of citizenship in this nation, either by birth or adoption, carries with them the duty and obligation on the part of the individual to speak out the truth when the people and the state through their representative request same.

"For more than three centuries" says Wigmore, Evidence, Vol. 8, Pages 64-66, "it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence . . . he who will live by society must let society live by him, when it requires to. . . . From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole,—from justice as an institution, and from law and order as indispensable elements of civilized life."

Appendix "E"—Opinion of County Court, Tioga Co., N. Y.

Fellman in "The defendant's rights" at pages 167 and 168 states as follows: "The emphasis in our time upon the right of an individual to refuse to give testimony which will convict him of crime has tended to obscure the fact that this right to remain silent is altogether limited and exceptional. For the general rule is that one has a duty to testify, and to testify truthfully, . . . about matters in which grand juries . . . have legitimate interests."

"The testimony of people who have knowledge of the facts is essential if many of the processes of government are to function at all. . . . Clearly there is a duty to speak, for contrary to a wide-spread impression, there is no absolute right to silence."

Such duty and obligation are necessary to the administration of justice according to the forms and modes established in our system of government. This duty and obligation must be performed if such system is to survive and be maintained.

There is only a limited privilege of refusing to testify. This privilege is known as that against self incrimination. "Privilege" signifies the non-compellability to speak about the offense. The New York State Constitution, art. 1, sec. 6, provides: "No person shall be . . . compelled in any criminal case to be a witness against himself . . .".

In connection with such privilege a statement of applicable principles of natural law may be of value. The right of the individual must yield to the good of the community. The right of self protection is not as important as the protection of civilized society and the right of immunity against self incriminating testimony decreases as the clear and present danger to the state and community increases. Though the right to invoke the privilege is guaranteed by civil law the right disappears in the face of the threat of

danger to the state and people. Loss of the privilege and constitutional protection may be consistent with the foregoing principles and law.

At this point it appears proper to localize the consideration. Under the peculiar and perilous conditions incidental to an investigation by a grand jury in which there is no specified charge or named defendant, a witness need be alert and on his guard at all times.

When a witness appears before the grand jury he is alone. He does not have the association, advice and protection of legal counsel. He must stand on his own.

He is subject to inquiry by the prosecuting officer and twenty-three laymen. There is no judge sitting with the grand jury to rule upon the relevancy, competency or materiality of questions.

To make answer to a single question may be the opening of the door by the witness that would tend to waive his privilege against self incrimination and compel him to answer all questions concerning the subject matter involved.

In order to avoid such danger the witness must exercise his privilege against self incrimination and resort to silence. To overcome this danger, the legislature has provided immunity for the witness through Section 2447 of the Penal Law.

This section provides that " . . . if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question . . . such person shall comply with the order . . . then immunity shall be conferred upon him. . . ."

Two propositions seem to be set forth in such section: 1. any immunity which is granted is completed. 2. None can be acquired unless the witness claims his privilege.

Appendix "E"—Opinion of County Court, Tioga Co., N. Y.

Immunity means exemption or release from. Immunity signifies the non-liability for the offense itself. By immunity any possibility of guilt ceases. By and through immunity the danger of prosecution no longer exists. With complete immunity there can be no self-incrimination. Immunity replaces privilege.

To summarize, since the only consequence which the privilege against self-incrimination avoids is a criminal prosecution, if a competent authority, such as the grand jury, promises in advance not to prosecute, as in the granting of immunity, then one has no right to remain silent and must fulfill the duty and obligation of speaking the truth. The simplest form of obstructing justice is to refuse to answer a legal and proper question by a competent authority.

Now to consider the proof. In evaluating the evidence I am taking in chronological order the elements which constitute the crime charged.

(1) There is the presumption of regularity. In addition there are many documents and the testimony of the County Clerk and Foreman proving the formation and organization of the grand jury from its inception in the order of the court fixing the term of court and down through the required steps to the session behind closed doors at which the indictment was found. Likewise there is a stipulation covering such matter and signed by the defendant, his counsel and the district attorney. From such evidence and as a matter of law I find that the grand jury was legally and duly constituted, organized and in session at and prior to the time of the finding of the indictment.

(2) The minutes of the grand jury and the stipulation of the parties establish that more than sixteen grand jurors

were present and in attendance throughout and on February 25, 1958. From such proof and as a matter of law I find that more than a quorum of the grand jury was present during the consideration of this case and the finding of the indictment on February 25, 1958.

(3) The minutes of the grand jury for February 25, 1958, read in part as follows: "Anthony Peter Riela, being first duly sworn as a Witness before this Grand Jury, testified as follows". This same fact appears in the stipulation by the parties. The Foreman testified that he administered the oath to the witness. From such proof and as a matter of law, I find that the defendant was properly sworn as a witness at his appearance before the Grand Jury on February 25, 1958.

(4) The minutes of the grand jury establish that at the session of that body on February 25, 1958, the defendant was clearly informed by the District Attorney in these words "You will receive immunity from prosecution for any crime that may be revealed by your testimony."

Likewise this discourse in the presence and hearing of defendant: Mr. Boldman: "Mr. Foreman, . . . I ask if you have voted upon my request for immunity". Foreman, Grand Jury: "We have, Sir, and we voted to grant the immunity." Mr. Boldman: "And you have granted immunity to this witness, Anthony Peter Riela?" Foreman, Grand Jury, "Yes". Mr. Boldman: "Now, Mr. Riela, you have immunity from prosecution for any crime that may be revealed by your testimony. . . ." Mr. Riela: "Yes". This is clear and sufficient proof of the granting of immunity and the knowledge of same by the witness.

It is the defendant's contention that his refusal to answer the questions was not without reasonable cause, be-

cause the immunity granted protected him only against prosecution in the State courts, but not against possible prosecution in the Federal and state courts other than New York. This contention has no basis in law.

The rule is well established that a witness cannot refuse to testify because the immunity afforded does not extend to possible prosecutions in other jurisdictions. All that a State is required to do, or can do, is to give protection against the use of the witness' testimony in its own courts. If the law does that, as the statute here purports to do, that is sufficient to satisfy the constitutional requirements against self-incrimination. (Matter of Herlands (Carchietta), 204 Misc. 373).

The statute does not purport to give and could not give protection against a prosecution by Federal authorities. It does give ample protection against the use of such testimony in our own tribunals and it is perfectly well established that this is a sufficient immunity; that all the state is required to or can do is to give immunity against its own processes and, if it has done that, as this statute does, it has satisfied the requirements of the constitution. (Dunham v. Ottinger, 243 N. Y. 423; Hale v. Henkel, 201 U. S. 43; Brown v. Walker, 161 U. S. 591).

The sufficiency of the exemption afforded by a State immunity statute depends on whether the statute extends complete protection to a party against prosecution in the State courts and the use of compelled testimony therein. If it does, then the privilege of refusing to testify on the ground of self incrimination no longer exists and the refusal to answer questions is without reasonable cause.

Were the defendant's position here sustained, the People would be rendered powerless to conduct proper investigations and prosecutions in those areas of possible criminal

activity, where virtually all important evidence rests in tainted hands. The resultant harm to orderly criminal law enforcement would be incalculable. The purpose of immunity statutes is to obtain evidence from sources which otherwise would be barricaded behind the privilege against self-incrimination. (People v. Spiak, 11 Misc. 2d, 1043).

To summarize, the rule is that when the danger of prosecution has been effectively removed, the reason for the privilege against self incrimination no longer exists and, consequently, the privilege cannot properly be asserted. Thus, where prosecution is barred by reason of a grant of immunity, the witness may be compelled to answer. In other words, when immunity is granted the State becomes entitled to the testimony. Refusal means punishment.

In this proceeding, immunity had been granted to and conferred upon the witness by the grand jury. Such immunity by its mere granting is and was complete and absolute as to defendant, and binding in all parts of and upon all agencies of the State (Greenleaf, 176 Misc. 566).

This immunity was the maximum which could be granted by New York State and therefore the requirement of the Federal and State constitutions has been satisfied. (Matter of Peo. v. Knapp, 4 Misc. 2nd 449).

Defendant also contends that no immunity was granted by reason of the fact that the minutes of the Grand Jury were made available to the State Commissioner of Investigations. This exchange and cooperation between branches of the state government in no way impairs the complete immunity granted to the defendant. Such contention is without merit.

From such proof and as a matter of law I find that immunity was voted for and granted by the Grand Jury to the defendant within the meaning and coverage of Section 244 of the Penal Law.

(5) The foreman testified as to the purpose and objective of the investigation that was being conducted by the grand jury, and particularly in seeking the purpose of the Apalachin meeting, who were there, what was done, if any law had been violated or crime committed, and why sixty-two or more men, some with criminal records, were present. The minutes of the grand jury for February 25, 1958, contain a lengthy statement by the District Attorney to the witness concerning the purpose and scope of the investigation, and particularly as to any commission of the crimes of conspiracy, bribery of public officials and other crimes in the County of Tioga, and as to the fact that the witness was in attendance at the Apalachin meeting with sixty-one other men. All of the questions asked concerned persons present at such Appalachin meeting and possible activities of the witness in connection therewith. The presumption is that the grand jury conducted and carried on an inquiry in good faith.

From such proof it appears that legal and proper interrogatories were propounded to the defendant, and that such interrogatories were material, relevant and pertinent to the issue and to the investigation then being conducted by the grand jury and I so find and hold as a matter of law.

(6) The minutes of the Grand Jury of February 25, 1958, establish that the witness, after being granted and informed concerning immunity, refused to answer the seventeen questions set forth in the indictment; and that the witness had been informed as to the nature and purpose of the investigation and as to the inquiry into the Apalachin meeting.

The witness had breaks in time during his appearance on the stand, providing the benefit of consultation with and advice by his counsel prior to his refusal to answer such questions.

In other words, the witness had every opportunity, time and source from which to gain full knowledge of the law, his position and his duty and liability.

This item appears in the Grand Jury minutes: "I'll ask permission to consult my lawyer." "Yes—would you like a short adjournment? It will be noted on the record that the witness requests permission to consult with his attorney for a short time." Such conduct revealed that he was fully cognizant of what was going on.

I find as a matter of fact that by such conversation, conduct and action of the defendant there was established a wilful, contumacious and unlawful refusal on his part to answer the questions propounded by and for the Grand Jury.

(7) Assuming, but not conceding, that the points of the defendant are well taken, there is nothing in the case that tends to overcome the presumption that the indictment is based upon legal and sufficient evidence. That presumption continues until there is satisfactory proof to the contrary. (People v. Nitzberg, 289 N. Y. 523; People v. Howell, 3 A. D. 2d. 153). In this case there appears no such proof.

Defendant in his defense has advanced many points. Among other things she contends that the grand jury was without jurisdiction and power to conduct the investigation in the absence of a complaint or of evidence that a crime had been committed.

In support of such point he has cited the case of Matter of Morse, 42 Misc. 664. This is a decision by General Sessions, New York County, in 1904. The court held that a grand jury must be shown by complaint or knowledge acquired that there is reason to believe a crime was committed by particular persons, and may not institute any

inquiry on chance or speculation. Since about 1906 no mention seems to have been made of this case in New York opinions.

There do appear extensive references to the case of Blair v. United States, 250 U. S. 273; Hendricks v. United States, 223 U. S. 178, and Hale v. Henkel, 201 U. S. 43. In the Blair case the defendant questioned the authority and jurisdiction of a grand jury in an effort to set aside a conviction for contempt.

In affirming the conviction the Court said, "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable results of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime . . . At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction."

In the Hale decision the court put forth the rule that "the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court had been committed".

Before the defendant was called as a witness before the grand jury in the instant case, evidence was presented, according to the testimony of the foreman, to the Grand Jury that sixty-two men, including defendant, and some with criminal records, were in attendance at the Apalachin meeting. Certainly such evidence gave the Grand Jury

reasonable cause to believe that a crime may have been committed in connection with that meeting.

The Blair and Hale decisions above quoted appear to be the present day law and are adopted by this court in determining that the point is without merit.

In this case the defendant was not given any direction by the Court and he did not appear at any time before the court prior to the reporting of the indictment.

The defense strongly stresses the contention that this failure to provide a direction by the court for the witness deprived the Grand Jury of the jurisdiction and right to find and report the indictment.

Although no decision in point has been found, still there seems to be an authority in the case of People v. Saperstein, 2 N. Y. 2nd 209, in which no direction by the Court had been provided to the accused person before indictment and in which the court charged that the Jury as follows:

"The law also says that a Grand Jury at times shall conduct inquiries and investigations to determine whether or not a crime has been committed, before it is possible to formulate a specific charge, or file an indictment, against any particular person or persons".

The fact appears in the record that the witness was clearly and thoroughly informed, in the presence, hearing and on behalf of the Grand Jury and prior to the asking of the questions and the finding of the indictment, as to the reason for and purpose of the investigation, the granting of immunity by that body and the effect thereof, and his resulting position. Likewise he was given the time and opportunity to consult with his attorney. The Foreman said to him: "Mr. Witness, on behalf of this Grand Jury, I order and direct you to answer that question." Did not

those things satisfy the purpose of a direction? What more could a direction by the court have accomplished?

Section 600 of the Penal Law and Section 750 of the Judiciary Law provide for the violation, prosecution and punishment, and Section 602 of the Penal Law provides for the finding of the indictment. These sections are silent as to a direction by the court, particularly under the facts of the instant case.

The grand jury is a part of the court. A contempt of the grand jury is a contempt of the court. A grand jury may indict for an indictable violation committed in its presence and official session. The authority of the grand jury to indict without a direction by the court to the witness is inherent in that body. I so find.

Any question as to whether a proceeding should have been conducted to determine if the person was a material witness within the coverage of Section 618-a of the Code of Criminal Procedure is collateral and not relevant to the issue in this case. The record tends to show that the witness appeared voluntarily.

Whether his refusal to answer the seventeen questions set forth in the indictment constitutes one crime or seventeen different violations is a necessary part of this decision. In the case of People v. Kasherman, 177 Misc. 200, the holding is that each succeeding refusal to answer is a new contempt. In the Matter of Amato, 204 Misc. 454, it is said that a separate and distinct act of contumacious and wilful refusal to answer legal and proper interrogatories is a separate and distinct act of criminal contempt.

In this case each of the seventeen questions is separate, distinct and independent. For such reason I find that the refusal of the defendant to answer each of the seventeen questions constitutes and is a violation under each of the

seventeen counts of the indictment, that is, in the aggregate seventeen violations.

To sift through and set apart the less-essentials and non-essentials is to unfold and reveal the essential elements necessary to constitute a case and violation within the purview of Section 600, subdivision 6 of the Penal Law.

I, therefore, rule that there were facts and circumstances proved sufficient to establish beyond a reasonable doubt that the defendant committed the acts as charged and set forth in the indictment.

I conclude and find that the People have sustained the burden of proof and have established beyond a reasonable doubt that the defendant is guilty of the crime of criminal contempt in violation of Section 600, subdivision 6, of the Penal Law, under each of the seventeen counts of the indictment, and as such is guilty of a separate violation under each count.

Findings of fact and conclusions of law heretofore reached in this opinion are implicit in my verdict as the judge of the facts and the law.

I find the defendant guilty as charged.

Dated October 15, 1958

FRANCIS J. CLOHESSY
County Judge of Tioga County

APPENDIX "F"

Judgment of Conviction

At an adjourned term of the County Court held in and for the County of Tioga at the Court House in the Village of Owego, N. Y., on the 12th day of July, 1960.

Present:

HON. FRANCIS J. CLOHESSY,
County Judge of Tioga County.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ANTHONY PETER RIELA

The defendant, Anthony Peter Riela, having been indicted by a Grand Jury sitting in connection with the County Court held in and for the County of Tioga on the 25th day of February, 1958, which indictment sets forth seventeen counts, each of which charges the Crime of Criminal Contempt in Violation of Section 600, Subdivision 6, of the Penal Law of the State of New York, committed on the 25th day of February, 1958,

And the defendant, Anthony Peter Riela, having appeared in County Court with Louis Mansdorf, Esq., his Counsel, and having been tried before the Hon. Francis J. Clohessy, County Judge of Tioga County at a trial without

a jury beginning on September 30, 1958 and terminating on October 3, 1958;

And the Hon. Francis J. Clohessy, County Judge of Tioga County having filed his Decision on the 15th day of October, 1958, finding the defendant, Anthony Peter Riela, guilty under and as charged in each of the seventeen counts of the indictment;

And the defendant, Anthony Peter Riela, having thereafter appeared in County Court with Louis Mansdorf, Esq., his Counsel, on the 24th day of October, 1958, and having been sentenced under the first count of the indictment to sixty (60) days imprisonment in the Tioga County Jail and to pay a fine of $250.00, and stand committed to the Tioga County Jail until the fine be satisfied at the rate of one day for every dollar of the fine unpaid.

And it having been further Ordered that the defendant, Anthony Peter Riela, under each of the sixteen remaining counts be sentenced to imprisonment in the Tioga County Jail for sixty (60) days and to pay a fine of $250.00, and stand committed to the Tioga County Jail until the fine be satisfied at the rate of one day for every dollar of the fine unpaid, it being the intention and Judgment that a sentence of sixty (60) days imprisonment and a fine of $250.00 should apply to and cover each count; and it further being Ordered by the Court that the respective jail sentences of sixty (60) days imprisonment under each of the seventeen counts should run concurrently.

And the defendant, Anthony Peter Riela, having appeared in Court on the 20th day of June, 1960, with Louis Mansdorf, Esq., his Counsel for re-sentencing pursuant to an Order of the Court of Appeals of the State of New York filed May 11, 1960 whereby the Judgment pronounced October 28, 1958 was reversed and the case remitted to County

Court for re-sentencing; and the defendant having made application to the Court for an adjournment of sentence pending an Appeal to the United States Supreme Court; and the sentence having been adjourned until July 12, 1960;

And the defendant, Anthony Peter Riela, having appeared in County Court on July 12, 1960 with Louis Mansdorf, Esq., his counsel, and the Court having set aside and vacated the previous sentence imposed on October 24, 1958, and the defendant, Anthony Peter Riela having been asked by the Clerk if he had any legal cause to show why judgment should not now be pronounced against him, and the defendant having answered in the negative;

And the defendant having waived the 48 hour waiting period;

It is hereby Ordered by the Court that the defendant, Anthony Peter Riela, be imprisoned in the Tioga County Jail for a term of sixty (60) days and pay a fine of $250.00.

La Verne M. Brister
County Clerk

APPENDIX "G"

Notice of Appeal to the Supreme Court of the United States

IN THE
COUNTY COURT OF THE COUNTY OF TIOGA
STATE OF NEW YORK

COUNTY OF TIOGA

No. 1050

ANTHONY PETER RIELA,

Appellant,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

Notice of Appeal to the Supreme Court of the United States:

I. NOTICE IS HEREBY GIVEN that ANTHONY PETER RIELA, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York dated and entered herein on the 8th day of July, 1960, denying a motion for reargument, and from the order of said Court dated and entered on the 21st day of April, 1960, affirming the judgment of conviction herein.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

Appellant was convicted of the crime of criminal contempt (a misdemeanor), in violation of New York Penal Law § 600, subdivsion (6) (McKinney's Consolidated Law of New York, Book 39, Part 1); was sentenced to 60 days

confinement in the Tioga County Jail and to pay a fine of $250.00; and is presently enlarged on bail up to August 15, 1960, in the sum of $10,000.00 pending this appeal, and application to this Court for a further stay.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Indictment.
(2) Court's minutes of trial.
(3) Motion for directed judgment of acquittal.
(4) Motion to dismiss indictment.
(5) Motion to acquit.
(6) Motion for arrest of judgment and for a new trial.
(7) Judgment of conviction dated October 24, 1958.
(8) Court of Appeals, order affirming conviction but reversing and remanding, dated April 21, 1960.
(9) Court of Appeals, order denying motion for re-argument, dated July 8, 1960.
(10) Judgment of conviction on re-sentence dated July 12, 1960.

III. The following questions are presented by this appeal:

(1) Was the contempt conviction repugnant to the Fourteenth Amendment where a New York grand jury confers New York State immunity on a New Jersey resident witness, but the Court fails to direct the non-resident witness to answer questions after his refusal on the ground of self

incrimination and the existing perils of prosecution in his home state and the Federal government?

(2) Is the joint application of Penal Law § 2447 with § 618a of the Code of Criminal Procedure, to the facts herein, repugnant to the spirit and interpretation of the Fourteenth Amendment, and were the witness' rights and privileges thereunder violated, where a New York non-resident grand jury witness, a target of investigation and a potential defendant, is lured into New York by application of the Reciprocal Witnesses Act (§ 618-a C. C. P.) by designating him as a material witness, and the immunity offered to him pursuant to Penal Law § 2447 is not co-extensive with the perils of prosecution existing for him in his home state, other states and the Federal government, and Tioga County grand jury minutes have, pursuant to court orders, been forwarded to New York State agencies which are obligated by statute (§§ 7051-7057, McKinney's Unconsolidated Laws) to cooperate with witness' home state, other states, and the Federal government, and there is no Court direction that the witness answer grand jury questions despite his pleas of privilege against self-incrimination?

LOUIS MANSDORF,
Attorney for Anthony Peter Riela,
Appellant.
320 Broadway
New York 7, N. Y.
(WOrth 4-4999)

Dated: New York, N. Y.
August 2, 1960.

(Filed with Tioga County Court, August 4, 1960.)

APPENDIX "H"

Statutes Involved

Penal Law § 600. CRIMINAL CONTEMPT. A person who commits a contempt of court, of any one of the following kinds is guilty of a misdemeanor:

* * * * *

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * * (McKinney's Consolidated Laws, Vol. 39, Part 1) L. 1935, c. 299, § 1, eff. April 5, 1935.

CODE OF CRIMINAL PROCEDURE. SECTION 618-a (McKinney's Consolidated Laws, Vol. 66, Part 2)

SECURING ATTENDANCE OF WITNESSES FROM WITHIN AND WITHOUT THE STATE IN CRIMINAL PROCEEDINGS.

1. As used in this section the following words shall have the following meanings unless the context requires otherwise.

"Witness" shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

"State" shall include any territory of the United States and the District of Columbia.

"Subpoena" shall include a summons in any state where a summons is used in lieu of a subpoena.

* * * * *

3. Witness from another state subpoenaed to testify in this state. If a person in any state, which by its laws has

made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him until he may be released by bail, recognizance, or order of the judge issuing the certificate.

* * * If such witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

* * * * * *

3. Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general

purpose to make uniform the law of the states which enact it. • • • L. 1936, c. 387, eff. May 1, 1936.

Penal Law § 2447. WITNESSES' IMMUNITY. 1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

* * * * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; * * *.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

L. 1935, c. 299, § 1, eff. April 5, 1935.

(McKinney's Consolidated Laws, Vol. 39, Part 2.)

UNCONSOLIDATED LAWS, McKINNEY'S VOLUME 65, PART 2, SECTIONS 7051-7057 (STATE COMMISSION OF INVESTIGATION).

Section 7052. FUNCTIONS, POWERS AND DUTIES OF THE COMMISSION.

Subd. 5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

Subd. 6. The commission shall examine into matters relating to law enforcement extending across the boundaries of the state into other states; and may consult and exchange information with officers and agencies of other states with respect to law enforcement problems of mutual concern to this and other states.

Subd. 7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for

the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

Subd. 9. The commission shall make an annual report to the governor and legislature which shall include its recommendations. The commission shall make such further interim reports to the governor, or to the governor and legislature, as it shall deem advisable, or as shall be required by the governor.

L. 1958, c. 989[illegible], eff. May 1, 1958.

NEW JERSEY REVISED STATUTES

ARTICLE 2, PRIVILEGES OF WITNESS:

2A:81-4 General Rule:

> Except as otherwise provided by statute, a witness shall not be excused from answering any questions relevant and material to the issue (L. 1900, c. 150, §§ 5, 8, pp. 363, 364).

2A:81-5 Personal Privilege Generally.

> No witness shall be compelled to answer any question if the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate (L. 1900, c. 150, § 8, p. 364).

GENERAL BUSINESS LAW:

(McKinney's Vol. 19, Consol. Laws)

§ 352. Investigation by Attorney General.

5. * * *. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who

shall disclose to any person other than the attorney-general the name of any witness examined or any other information obtained upon such inquiry except as directed by the attorney-general shall be guilty of a misdemeanor. Added L. 1921, c. 649; amended L. 1923, c. 600, § 1; L. 1925, c. 239, § 1; L. 1926, c. 617, § 1; L. 1927, c. 365; L. 1932, c. 214; L. 1935, c. 271; L. 1949, c. 525; L. 1955, c. 553, § 1, eff. April 21, 1955.

FILE COPY

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OCT 24 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 445

ANTHONY PETER RIELA,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

GEORGE BOLDMAN,
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Attorney for Appellee,
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Owego, New York.

ELIOT H. LUMBARD,
Chief Counsel,

ARNOLD M. WEISS,
Assistant Counsel,

NEW YORK STATE COMMISSION OF INVESTIGATION,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 445

ANTHONY PETER RIELA,

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MOTION TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, dated April 21, 1960, which unanimously upheld appellant's conviction for criminal contempt of the Grand Jury of Tioga County, New York, under Section 600 (6) of the New York Penal Law, for unlawfully refusing to answer the Grand Jury's inquiries concerning the so-

called "Apalachin Meeting." Appellant's conviction previously was affirmed unanimously by the Appellate Division, Third Department, of the New York Supreme Court, on January 8, 1960 (1345-1350).*

On October 24, 1958, sitting without a jury, the Tioga County Court, *Clohessy, J.*, entered a judgment of conviction against appellant (109-118); trial had been held in Tioga County on September 30th and October 1st, 2nd and 3rd, 1958. The original judgment sentenced appellant to sixty days in jail on each of seventeen separate counts of criminal contempt, all terms to run concurrently, and fined him $250.00 on each count for a total fine of $4,250.00 (116-117). While affirming appellant's conviction, the Court of Appeals held his contemptuous conduct during his appearance before the Grand Jury constituted but one single contempt and therefore directed that appellant be resentenced and a new judgment of conviction entered (Jurisdictional Statement, Appendix A, p. 3a). The County Court subsequently resentenced appellant for the one crime of criminal contempt to sixty days imprisonment and a fine of $250.00 (Jur. State., App. F). It is from this new judgment, entered on July 12, 1960, that appellant has attempted to perfect both this appeal as of right and simultaneously petition this Court for a writ of certiorari (See also No. 460, October Term, 1960).

On July 8, 1960, the Court of Appeals denied appellant's motion for re-argument, 8 N.Y. 2d 1011 (1960); it also amended the remittitur, 8 N.Y. 2d

* Numerals in parentheses refer to folio numbers in the record on appeal to the Court of Appeals.

1008 (1960), as requested by appellant, so as to restate the federal questions considered by that Court (See Jur. State., App. B and C).

Appendices attached to the People's brief in opposition to the petition for a writ of certiorari set forth pertinent documents omitted from the record on appeal.

The New York State Commission of Investigation assisted the District Attorney of Tioga County in the preparation of this brief pursuant to his request under the provisions of Section 2(4), Chapter 989 of the New York Laws of 1958; Section 7052(4), McKinney's Unconsolidated Laws of New York, which reads:

> "Upon request of district attorneys and other law enforcement officers, the commission shall cooperate with, advise and assist them in the performance of their official powers and duties."

The Opinions Below

The opinion of Judge Fuld on behalf of the Court of Appeals is reported at 7 N.Y. 2d 571, 200 N.Y.S. 2d 43 (1960), and the opinion of Mr. Justice Coon on behalf of the Appellate Division, Third Department, is reported at 9 A.D. 2d 481, 195 N.Y.S. 2d 558 (1959) (1366-1389). The opinion of the Tioga County Court, *Clohessy, J.*, is reported at 14 Misc. 2d 213, 178 N.Y.S. 2d 873 (1958) (1288-1337). Each of these opinions is set out in appellant's, Jur. State., Appendices A, D, and E, respectively.

The Constitutional Provision and Statutes Involved

The only constitutional provision cited by appellant is the Fourteenth Amendment to the United States Constitution.

The pertinent statutory provisions not quoted in this motion are set forth in appellant's Jur. State., Appendix H.

The Facts

On November 14, 1957, the New York State Police reported stopping and questioning at the premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who resided in various sections of this country and abroad. Appellant, a claimed resident of New Jersey, was among this group (394-395).

The circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location on a Thursday in November—indicated extensive planning and unity of purpose. The meeting attracted extraordinary attention. The Grand Jury of Tioga County, *the location of this event*, initiated an investigation shortly thereafter to determine whether any crimes had been planned or committed in connection with that meeting (389-391, 403).

The Grand Jury was particularly concerned with possible violation of the laws against criminal conspiracies, bribery of public officials, and monopoly and restraint of trade (12, 389-391, 409, 493).

Accordingly, pursuant to Section 618-a of the Code of Criminal Procedure, the New York enactment of the Uniform Reciprocal Witness Act, a certificate was obtained from the Tioga County Court stating appellant was a "material and necessary" witness in the Grand Jury's investigation (App. to People's brief in opp. to petition for cert.). A hearing thereafter was held in the Essex County Superior Court of New Jersey, where appellant apparently resided, and the usual form of subpoena-order subsequently issued directing appellant's appearance before the Tioga County Grand Jury (App. to People's brief in opp. to petition for cert.). After issuance of this subpoena appellant chose to appear voluntarily before the Grand Jury (130-141).

Upon appearance on February 25, 1958, appellant exercised his privilege against self-incrimination as to seventeen questions directed to him by the Grand Jury concerning the meeting at Barbara's (214-222). The Grand Jury then voted to confer and did confer immunity upon appellant at the request of the District Attorney (222-226). Appellant was informed immunity was conferred under the authority of Section 2447 of the Penal Law, and further told the meaning and scope of that conferral; he was clearly warned that failure to respond after immunity was conferred might result in contempt proceedings such as this very case (227-230).

The first question to appellant was then repeated and again he refused to answer (230). The Foreman of the Grand Jury, upon request of the District Attorney, then directed appellant to answer the question (231). Appellant continued to refuse to answer

that question and the following sixteen questions, although directed to do so as to every question (231-254). In each instance his refusal took the form of claiming his privilege against self-incrimination even though immunity had been conferred upon him (231-254).

Counsel to appellant accompanied him to Tioga County for this appearance and was available outside the grand jury room during his direct refusals to respond to any questions concerning the Apalachin meeting (228-230).

The Grand Jury then indicted appellant under Section 600(6) of the Penal Law for criminal contempt (10-82). The seventeen counts in the indictment represented refusal of appellant to answer each of the seventeen questions put to him before the Grand Jury on February 25, 1958 (10-82).

As noted, a judgment of conviction was entered on October 24, 1958 after trial without a jury (109-118).

ARGUMENT

POINT I

Appellant has failed to show the New York Statutes he now claims are repugnant to the United States Constitution were so challenged and necessarily passed upon below and, therefore, he cannot meet the jurisdictional requirements for appeal as of right.

Appeal to this Court as a matter of right is based upon Title 28, United States Code, Section 1257(2) which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

Section 1257(2) has been construed strictly to reject asserted jurisdiction in the absence of a clear and explicit demonstration by the appellant that in the state courts he challenged the validity of a statute as repugnant to the United States Constitution, treaties or laws; that the state courts passed upon such challenge of repugnance; that the state courts rejected the challenge of repugnance and ruled in favor of validity of the statute. *Charlestown Federal Savings &*

Loan Assoc. v. *Alderson*, 324 U.S. 182 (1945); *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U.S. 1 (1920); *Mergenthaler Linotype Co.* v. *Davis, et al.*, 251 U.S. 256 (1920).

Jurisdiction under Title 28, United States Code, Section 1257 (3) (for a writ of certiorari) requires only alleged denial by the state court of an asserted federal right, as contrasted with the strict requirements of Section 1257(2) for appeal as of right. A prior challenge of a state statute as repugnant to federal law is unnecessary under Section 1257 (3). Thus litigants are not cut off arbitrarily from an approach to this Court, and the Court gains necessary flexibility to consider a greater number of applications in its discretion. It is not enough for appellant simply to state jurisdiction lies as of right and make a citation to the United States Constitution.

Yet nowhere in his Jurisdictional Statement does appellant challenge a state statute as repugnant to federal law, as he must. Nor does the opinion of the New York Court of Appeals, or its original or amended remittitur, reflect such a challenge.

The amended remittitur merely states appellant claims "... the application in his case of §2447 of the Penal Law and §618-a of the Code of Criminal Procedure violated his rights under the Fourteenth Amendment of the Federal Constitution" (Jur. State. p. 9a). No jurisdiction for appeal as of right under Section 1257 (2) is conveyed by this claim, as discussed above.

Also, appellant makes no argument, and he could not do so, that the *application* of those two State stat-

utes make both statutes *void* under federal law. Indeed, the remittitur is silent as to appellant's specific claim regarding those statutes. Cf. *Live Oak Water Users Ass'n. v. R.R. Comm. of California*, 269 U.S. 354 (1926). Appellant's argument, however, is directed solely toward an alleged deprivation of his rights under the due process clause of the Fourteenth Amendment (Jur. State. p.15). In other words, appellant argues that these two State statutes, which have been upheld by the highest State court, as applied denied him due process of law, but he does not argue they are void under federal law. See Stern & Gressman, *Supreme Court Practice* 58 (2d Ed. 1954).

Moreover, it is significant appellant does not claim *either* statute (Section 2447, Penal Law or Section 618a, Code of Criminal Procedure) repugnant to federal law; rather, he claims the peculiar effect of the "joint application" of both is to deprive him of federal rights. This theory fails to meet the requirements of Section 1257(2) in that it does not even purport to challenge the constitutionality of either statute.

Under these circumstances, review can only be on writ of certiorari. In his petition for such a writ, appellant can properly address to the Court's discretion the factors he claims deprived him of "due process".

POINT II

In any case, the alleged federal questions are not substantial or worthy of consideration by this Court.

At one or another place in his Jurisdictional Statement appellant raises a large number of alleged federal questions. They are not significant or substantial, and simply restate the same allegations and arguments scattered throughout appellant's brief in varying combinations of language. Surely they do not warrant the attention of this Court. Should this Court find no jurisdiction for appeal as of right, it should also refuse to grant certiorari because of the lack of substance in appellant's contentions.

Since appellant's petition for a writ of certiorari contains these identical allegations as well, in the interests of economy the specific discussion of each is set forth in the People's brief in opposition to that petition (No. 460, October Term, 1960).

Conclusion

Appellant has failed to satisfy the essential jurisdictional requirements of Title 28, United States Code, Section 1257 (2), and this appeal should be dismissed.

In any case, no substantial federal question worthy of consideration by this Court has been adequately raised, and the appeal should be dismissed. In the alternative, if jurisdiction for appeal is found the

decision of the New York Court of Appeals should be affirmed in all respects.

Should this appeal be treated as a petition for a writ of certiorari, the petition should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Appellant,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1960

No. ~~460~~ 445

ANTHONY PETER RIELA,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S REPLY BRIEF

POINT I

The New York statutes involved were specifically urged as unconstitutional.

This reply brief is necessitated solely because of the misstatements of fact contained in the motion to dismiss.

The following are major facts set forth in the record, contained in the Jurisdictional Statement, and misrepresented by the respondent:

(1) Penal Law § 2447 was specifically urged as unconstitutional at pages 305 and 402.*

(2) § 618-a Code of Criminal Procedure was specifically urged as unconstitutional at page 405.

* All pages refer to the certified record on appeal to the Court of Appeals.

(3) The joint application of P.L. 2447 and § 618-a, C.C.P. was specifically urged as unconstitutional at pages 405-406.

(4) § 600 (6) Penal Law was specifically claimed to be applied unconstitutionally at pages 421-422.

The amended remittitur (Jur. State. p. 9a) clearly sets forth the constitutional issues considered by the Court of Appeals.

On page 5 of the motion to dismiss, reference is made to the Appendix to People's Brief in Opposition to Petition for Certiorari. This exhibit is an order of the New Jersey Essex County Court, allegedly stating that a hearing was held. *However, it is not a part of the certified record, nor was it ever introduced into evidence by the People.* It is now urged as evidence of a fact which the certified record does not contain. It should be totally disregarded.

POINT II

The federal questions are substantial and require consideration by this Court.

Pages 10 through 18 of the Jurisdictional Statement set forth in detail the importance of the questions involved.

As recently as October 10, 1960, this Court granted review in *Slagle* v. *Ohio*, Case No. 105, 29 L. W. 3093. Questions 2 and 3 in *Slagle* are substantially similar to questions 1 and 2 herein (p. 4, Jur. State.). The instant case has further uniqueness in that the Court of Appeals opinion herein is *contra* to *Brown* v. *United States*, 359 U. S. 41, 49, and *Quinn* v. *United States*, 344 U. S. 155, 167.

Further, the appellant here is a New Jersey resident who is charged with contempt of a New York County court, and not contempt of a grand jury. Despite his plea of privilege against self-incrimination and the failure of the Court to direct him to answer or to hear the merits of his plea, the Court ruled that a witness who is a New York non-resident has sufficient protection with New York immunity.

CONCLUSION

The motion to dismiss the Jurisdictional Statement should be denied.

Respectfully submitted,

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